THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

POLYGON NORTHWEST COMPANY, Plaintiff, vs. NATIONAL FIRE AND MARINE INSURANCE COMPANY, Defendant.	No. C11-92Z ORDER

THIS MATTER comes before the Court on the motion for partial summary judgment filed by defendant National Fire & Marine Insurance Company ("NFM"), docket no. 9. Having reviewed the papers filed in support of, and opposition to, NFM's motion, the Court enters the following Order.

I. BACKGROUND

Plaintiff Polygon Northwest Co., LLC ("Polygon") is a Washington limited liability company, with its principal place of business located in Bellevue,

Washington. Compl. at ¶ 1, docket no. 2-1; see also Jacobi Decl., Ex. F, docket no. 10. Non-party Wood Mechanix, LLC ("Wood Mechanix") is an Oregon limited liability company that does business as a subcontractor on residential construction projects. Jacobi Decl., Exs. B, N, docket no. 10.

On November 29, 2005, general contractor Tasbourne Place Townhomes, LLC, ("Tasbourne") entered into a contract with Wood Mechanix (the "Subcontract") pursuant to which Tasbourne agreed to pay Wood Mechanix to construct townhomes on property owned by Polygon,[1] in Hillsboro, Oregon. Id.; see also Compl. at ¶ 3, Appx. A, docket no. 2-1.

Wood Mechanix agreed to obtain general liability insurance (minimum $2,000,000.00 policy limit), automobile liability insurance (minimum $1,000,000.00 policy limit) and Oregon Worker's Compensation Insurance (in the amount required by Oregon law). See Jacobi Decl., Ex. R at Ex. C ¶ 2., docket no. 10. The Subcontract also obligated Wood Mechanix to ensure that Polygon was identified as an additional insured on the insurance policies. Id. at ¶ 2.3(a). In requiring the additional coverage, the parties agreed that:

> It is the intent of this paragraph that [Wood Mechanix's] insurer provide the above coverage to the fullest extent permitted by ORS 30.140. To the extent any provision of this Section . . . would otherwise be considered void under ORS 30.140, such provision shall be deemed to require the most extensive coverage permitted under ORS 30.140 and not more.

[1] Polygon also acted as the project manager and signed the Subcontract as Tasbourne's principal. Jacobi Decl., Ex. R, docket no. 10.

Jacobi Decl., Ex. R at Ex. C ¶ 2.8, docket no. 10. Wood Mechanix applied for an insurance policy through its Oregon insurance broker, AON Risk Services of Oregon ("AON"). Jacobi Decl., Ex. C, docket no. 10. AON submitted the application to NFM, a Nebraska-based insurer. See id. Ex. A. NFM approved the application and issued Wood Mechanix a general liability insurance policy, number 72LPE706901 (the "Policy"), on December 9, 2005. Id. The Policy provided for limited coverage at two specific construction sites where Wood Mechanix had already commenced work, and "[a]ny new projects where the work performed by any 'insured' . . . first commences during the policy period."[2] Id.

On February 6, 2006, an employee of Wood Mechanix, Arthur Yeatts, was injured while working on the Tasbourne/Polygon construction project. Id. Ex. E. More than two years later, on April 8, 2008, Mr. Yeatts brought a lawsuit against Polygon in Oregon state court, seeking to recover damages for the injuries he sustained while working for Wood Mechanix at the Polygon construction site in Hillsboro, Oregon. Id.

On December 1, 2009, Polygon's Oregon counsel, Ball Janik, LLP, sent a letter to NFM, claiming coverage under the Policy as an additional insured, and tendering the defense of the Yeatts litigation. Id. Ex. G. NFM reviewed the Policy, could not locate an endorsement identifying Polygon as an additional insured, and on January

[2] It is not clear from the current record when the Tasbourne/Wood Mechanix construction project at issue in this case commenced, and by extension, whether the disputed Policy covered work performed at that location. For purposes of the present motion, the Court assumes that the Policy applies.

21, 2010, declined to accept the tender. Id. Ex. H. On October 8, 2010, Polygon responded to NFM's denial letter from its offices in Bellevue, Washington, and forwarded a copy of a Policy endorsement purporting to name Polygon as an additional insured. Id. Ex. I.

After receiving the endorsement, NFM reopened its investigation on October 13, 2010, and hired the Oregon firm of Farrell & Associates to perform the investigation. Id. Exs. J-K. On November 2, 2010, Farrell & Associates recommended that NFM deny the claim for coverage. Id. Ex. L. NFM denied Polygon's claim for a second time on December 8, 2010. Id. Ex. P.

On December 15, 2010, Polygon initiated this lawsuit in Washington State Superior Court, alleging that NFM's refusal to accept the tender of defense constituted a violation of Washington's Insurance Fair Conduct Act ("IFCA"),[3] Consumer Protection Act ("CPA"), and various Washington insurance regulations. Compl., docket no. 2-1. Polygon also brought common law claims for breach of contract, negligence, and coverage by estoppel. Id.

[3] An insured may not bring an IFCA claim unless the insured has first given notice of the claim to its insurer and provided the insurer with twenty days to cure. RCW 48.30.015(8)(a). On December 10, 2010, Polygon sent a notice to NFM and the Washington Insurance Commissioner of its intent to bring an IFCA claim. Jacobi Decl., Ex. Q, docket no. 10. After sending the notice, Polygon waited only five days before filing suit and bringing its present IFCA claim. Compl., docket no. 2-1. Accordingly, in the alternative, the IFCA claim is DISMISSED because Polygon failed to comply with the IFCA's statutory notice requirements.

II. DISCUSSION

A. Summary Judgment Standard

The Court shall grant summary judgment if no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (2010). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A fact is material if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In support of its motion for summary judgment, the moving party need not negate the opponent's claim, Celotex, 477 U.S. at 323; rather, the moving party will be entitled to judgment if the evidence is not sufficient for a jury to return a verdict in favor of the opponent, Anderson, 477 U.S. at 249. To survive a motion for summary judgment, the adverse party must present affirmative evidence, which "is to be believed" and from which all "justifiable inferences" are to be favorably drawn. Id. at 255, 257. When the record taken as a whole, could not lead a rational trier of fact to find for the non-moving party, summary judgment is warranted. See, e.g., Beard v. Banks, 548 U.S. 521, 529 (2006).

B. NFM's Motion is Not Premature

NFM moves for partial summary judgment, arguing that the Court should apply Oregon law to this dispute and further dismiss Polygon's Washington law claims

for violation of the IFCA, violation of the CPA, and coverage by estoppel because Oregon law does not provide for similar causes of action.

Polygon devotes a substantial portion of its response to its argument that NFM's motion is premature. Specifically, Polygon contends that the substantive law that applies to its claims is irrelevant until the Court first determines whether Polygon is an insured under the Policy.[4] However, under Fed. R. Civ. P. 56(b), "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." (emphasis added). Such a motion may be directed at any claim or defense, or any part of a claim or defense, that the moving party chooses. Fed. R. Civ. P. 56(a). Accordingly, NFM's motion is not premature.

C. Choice of Law Rules

This is a diversity action under 28 U.S.C. § 1332. See Not. of Removal at ¶ 6, docket no. 1. Federal courts sitting in diversity must apply the forum state's choice of law rules to determine the controlling substantive law. Fields v. Legacy Health Sys., 413 F.3d 943, 950 (9th Cir. 2005) (quoting Patton v. Cox, 276 F.3d 493, 495 (9th Cir.

[4] When NFM took the same position earlier in the case, and proposed that the parties stay discovery on Polygon's statutory and extra-contractual claims pending a determination on the coverage issue, Polygon rejected NFM's proposal and demanded that discovery proceed simultaneously on all of its claims because "Polygon's allegations of bad faith and other violations of statutory and administrative law are interwoven with the issue of whether Polygon was an additional insured under the Policy issued by NFM." Joint Status Report, docket no. 8. Polygon cannot now contend that resolution of the applicable substantive law is premature or inefficient prior to resolution of the coverage issue.

2002)). Accordingly, the Court applies Washington's choice of law rules to determine which state's substantive law applies.

In Washington, choice of law disputes require a two-step inquiry. First, the Court must determine whether there is an actual conflict between the laws or interests of Washington and the laws or interests of another state. Seizer v. Sessions, 132 Wn.2d 642, 648, 940 P.2d 261 (1997). An actual conflict exists when the result of the issues is different under the law of the two states. Id. If there is no actual conflict, the presumptive local law applies. Erwin v. Cotter Health Ctrs., 161 Wn.2d 676, 692, 167 P.3d 1112 (2007).

In addition, Washington follows the rule of dépeçage, which may require the Court to apply the law of one forum to one issue, while applying the law of a different forum to another issue in the same case. Brewer v. Dodson Aviation, 447 F. Supp. 2d 1166, 1175 (W.D. Wash. 2006); Williams v. State, 76 Wn. App. 237, 241, 885 P.2d 845 (1994) ("[C]hoice-of-law depends upon which of two or more jurisdictions has the 'most significant relationship' to a specific issue.") (emphasis added). Accordingly, the Court must perform an issue-by-issue review of Polygon's claims to determine whether each claim presents an actual conflict between the laws of Washington and Oregon.

If the Court concludes that there is an actual conflict between the law of the two states on any given issue, then the Court must move on to the second step of the analysis, and determine which jurisdiction has the "most significant relationship" to

the particular issue. Seizer, 132 Wn.2d at 650. Washington courts have adopted the restatement tests for determining which jurisdiction has the "most significant relationship" to the occurrence and the parties. See Rice v. Dow Chem. Co., 124 Wn.2d 205, 213, 875 P.2d 1213 (1994) (applying RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 to tort dispute); Mulcahy v. Farmers Ins. Co. of Wash., 152 Wn.2d 92, 100-01, 95 P.3d 313 (2004) (applying RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 to contract dispute).

D. Step One: Actual Conflicts

Under the rule of dépeçage, the Court must separately determine whether there is an actual conflict between Washington and Oregon law on Polygon's claims for (1) breach of contract; (2) negligence; (3) violation of the IFCA; (4) violation of the CPA; and (5) coverage by estoppel.

1. Polygon's claims for Breach of Contract and Negligence

Neither party offers any authority or argument from which the Court can conclude that the validity of Polygon's breach of contract and negligence claims depends upon which state's law is applied. Accordingly, because the parties have not adequately briefed the conflict issue as to Polygon's breach of contract and negligence claims, the Court DENIES in part, without prejudice, NFM's motion as to those claims. See Erwin, 161 Wn.2d at 692.

2. There is an Actual Conflict Between Washington and Oregon Law on Polygon's IFCA Claim

Polygon's IFCA claim is predicated on NFM's alleged bad faith refusal to accept the tender of defense of the Yeatts litigation. See Compl. at ¶ 8, docket no. 2-1; see also RCW 48.30.015(1) (providing a cause of action to an insured for an insurer's unreasonable denial of coverage or benefits). In addition, Polygon contends that NFM is liable for treble damages under the IFCA for NFM's alleged violations of Washington insurance regulations. Compl. at ¶¶ 7, 14, docket no. 2-1; see also RCW 48.30.015(2) (providing that a court may award treble damages for an insurer's unreasonable denial of coverage or benefits under RCW 48.30.015(1), if the court also finds that the insurer violated Washington's insurance regulations).[5]

In Oregon, the most analogous statute to Washington's IFCA is the Oregon Unfair Claims Settlement Practices Act ("UCSPA").[6] Like the IFCA and its

[5] For purposes of an IFCA claim, violations of Washington's insurance regulations are only relevant in determining whether an award of treble damages is appropriate because violations of the regulations do not give rise to an independent cause of action under the IFCA. Weinstein & Riley, P.S. v. Westport Ins. Corp., 2011 WL 887552 at *30 (W.D. Wash. 2011) (Robart, J).

[6] Polygon argues that Oregon has no statute that is truly analogous to the IFCA, and therefore, that there is no "conflict" between the laws of Washington and Oregon. Resp. at 7, docket no. 13. The dispositive question is not, however, whether Oregon has an analogous statute. The pertinent question is whether the results of the litigation would be different under the laws of Washington and Oregon. See Seizer, 132 Wn.2d at 649. Thus, for example, in Seizer, the Washington Supreme Court held that an actual conflict existed between the laws of Washington and Texas, where Texas did not have a statute that was analogous to the Washington statute that would otherwise apply under the facts of that case. Id. at 649-50. Accordingly, the Court rejects Polygon's contention that the absence of a comparable statute eliminates any actual conflicts.

implementing regulations, the UCSPA prohibits a variety of unfair trade practices. Compare ORS § 746.230 with RCW 48.30.010; WAC 284-30-330, -360 to -380. However, although the IFCA creates a private cause of action for an insurer's unfair trade practices, see RCW 48.30.015(1), the UCSPA does not. Richardson v. Guardian Life Ins. Co. of Am., 161 Or. App. 615, 623-24, 984 P.2d 917 (1999) (affirming the trial court's dismissal of plaintiff's UCSPA claims on summary judgment "because violations of that act are not independently actionable.") (citing Farris v. United States Fid. & Guar. Co., 284 Or. 453, 458, 587 P.2d 1015 (1978)).

Moreover, although Washington law prohibits insurers from refusing to defend in bad faith, under Oregon law, an insurer's refusal to defend does not give rise to a tort claim for bad faith. See Warren v. Farmers Ins. Co. of Or., 115 Or. App. 319, 326, 838 P.2d 620 (1992). Accordingly, there is an actual conflict between the laws of Washington and Oregon on Polygon's IFCA claim.

3. There is an Actual Conflict Between Washington and Oregon Law on Polygon's CPA Claim

Violations of Washington's insurance regulations, such as the violations alleged in Polygon's complaint, constitute per se unfair or deceptive trade practices under the CPA. Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 394, 715 P.2d 1133 (1986).

Conversely, under Oregon's CPA equivalent, the Unfair Trade Practices Act ("UTPA"), matters relating to insurance are expressly excluded from unfair trade practices. ORS § 646.605(6); see also Steven W. Bender, Oregon Consumer

Protection: Outfitting Private Attorneys General for the Lean Years Ahead, 73 OR. L. REV. 639, 656 n.101 (1994) (noting that "insurance was expressly excluded from the UTPA presumably because unfair insurance practices were already regulated by Oregon's Department of Commerce."). Thus, the outcome of Polygon's CPA claim would be different under Oregon law, where violations of insurance regulations are not unfair or deceptive acts that are actionable under the UTPA. As such, there is an actual conflict between Washington and Oregon law on Polygon's CPA claim.

4. There is an Actual Conflict Between Washington and Oregon Law on Polygon's Coverage by Estoppel Claim

In Washington, when an insurer breaches its duty to defend in bad faith, the insurer is estopped from asserting that the insured's claim is outside the scope of the insurance contract. Kirk v. Mt. Airy Ins. Co., 134 Wn.2d 558, 564, 951 P.2d 1124 (1998). The Washington Supreme Court adopted such "coverage by estoppel" for public policy reasons, because it creates a strong incentive for the insurer to act in good faith. Id.

In Oregon, the courts have taken the opposite approach. Thus, in Timberline Equip. Co. v. St. Paul Fire & Marine Ins. Co., 281 Or. 639, 646, 576 P.2d 1244 (1978), the Oregon Supreme Court rejected the insured's argument that the insurer's breach of the duty to defend estopped the insurer from relying on the terms of the policy. Instead, the court held that "[w]hen a contract is breached, the injured party is entitled to receive what he would have if there had been no breach; he is not entitled to receive more." Id. Accordingly, as Oregon courts have rejected the tort claim of "coverage by

estoppel," and there is an actual conflict between the laws of Washington and Oregon on that claim.

E. Step Two: Most Significant Relationship

As there is an actual conflict between the laws of Washington and Oregon on Polygon's CPA, IFCA, and coverage by estoppel claims, the Court must engage in the second step of the conflicts analysis and determine which state has the most significant relationship to the parties and the claims. As all of the conflicted claims sound in tort,[7] the Court must take the following contacts into account in determining the applicable law:

(a) the place where the injury occurred;

(b) the place where the conduct causing the injury occurred;

(c) the domicil, residence, nationality, place of incorporation and place of business of the parties; and

(d) the place where the relationship, if any, between the parties is centered.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145. "These contacts are to be evaluated according to their relative importance with respect to the particular issue," and are to be considered while applying the "principles of the RESTATEMENT

[7] See Carideo v. Dell, Inc., 706 F. Supp. 2d 1122, 1128 (W.D. Wash. 2010) ("Washington courts follow Restatement section 145 to determine what law applies to tort and CPA claims."); see also Woo v. Fireman's Fund Ins. Co., 150 Wn. App. 158, 172, 208 P.3d 557 (2009) (holding that a claim for coverage by estoppel sounds in tort).

(SECOND) OF CONFLICT OF LAWS § 6."[8] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145. The Court's "approach is not merely to count contacts, but rather to consider which contacts are most significant and to determine where these contacts are found." Johnson v. Spider Staging Corp., 87 Wn.2d 577, 581, 555 P.2d 997 (1976). If the contacts are evenly balanced, the court may consider the interests and public policies of the concerned states. Myers v. Boeing Co., 115 Wn.2d 123, 133, 794 P.2d 1272 (1990).

In this case, the overwhelming majority of the relevant contacts and conduct took place in Oregon. Polygon's injury, the cost associated with having to defend

[8] The relevant principles set forth in Section 6 include:

(a) the needs of the interstate and international systems;
(b) the relevant policies of the forum;
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
(d) the protection of justified expectations;
(e) the basic policies underlying the particular field of law;
(f) certainty, predictability and uniformity of result; and
(g) ease in the determination and application of law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6. "Washington courts focus on the 4 contacts in Section 145 over these principles in Section 6 when conducting a choice of law analysis." Brewer, 447 F. Supp. 2d at 1176 n.4.

itself in the Yeatts litigation in Oregon state court,[9] took place in Oregon. See Jacobi Decl. Ex. E, docket no. 10. All of the conduct causing the injury took place in Nebraska and Oregon, where NFM denied the claim and performed the allegedly deficient investigation. See id. Exs. H, J-M, P. Most importantly, the relationship between the parties is centered in Oregon, where: (1) Wood Mechanix, an Oregon company, sought insurance through an Oregon insurance broker, id. Ex. C; (2) Wood Mechanix entered into the insurance contract with NFM, id. Ex. A; (3) Polygon entered into the Subcontract with Wood Mechanix, which required Wood Mechanix to have Polygon named as an additional insured, id. Ex. R; (4) the construction site was located, Id., Ex. E; (5) the injury to Mr. Yeatts occurred, id.; and (6) the underlying Yeatts case is being litigated. Id.

Conversely, the only significant contact with Washington is Polygon's incorporation here.[10] Jacobi Decl., Ex. F, docket no. 10. Addressing a case with a similar dearth of Washington contacts, the Washington Supreme Court held that "residence in the forum state alone has not been considered a sufficient relation to the

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[9] Although Polygon contends that it was injured in Washington because that is where it received NFM's denial of coverage, the Court is not persuaded by that argument. The "injury" sustained by Polygon is the cost incurred in defending itself in the Yeatts litigation, currently proceeding in Oregon state court. That injury necessarily arose in Oregon.

[10] There was some minimal correspondence between Polygon's Bellevue office and NFM in Nebraska. See Jacobi Decl., Exs. I-J, M-N, P. This correspondence first commenced in October 2010, two months before this litigation commenced, and nearly nine months after NFM first denied Polygon's claim. See id. Ex. I. These minimal contacts are insignificant when compared with the parties' Oregon contacts, and the Court has given them little weight.

action to warrant application of forum law." Rice, 124 Wn.2d at 216. Here, as in Rice, the only contact with Washington is Polygon's residence in the state, which is insufficient to warrant application of Washington law.

Nonetheless, Polygon argues that the Court must also consider that Washington has a strong interest in having its law apply in this context because the state has a stated policy of protecting consumers from insurers' bad faith insurance practices. See RCW 48.01.020-.030. However, as the Court has concluded that the contacts between Oregon and Washington are not evenly balanced, and indeed tip sharply in favor of Oregon, the Court may not look at which forum has a greater interest in the matter. See Myers, 115 Wn.2d at 133 (holding that the Court may only examine the competing state interests if the contacts are evenly balanced).[11]

[11] In addition, the principles set forth in restatement Section 6 weigh heavily in favor of applying Oregon law. For example, the record reflects that it was the parties' expectation that Oregon law would apply to any dispute. The Subcontract between Polygon and Wood Mechanix provided that "[i]t is the intent of this paragraph that [NFM] provide the above [insurance] coverage to the fullest extent permitted by ORS 30.140." Jacobi Decl. Ex. R at Ex. C ¶ 2.8, docket no. 10. This provision of the Subcontract indicates Polygon's clear intent that Oregon law should apply to the insurance policy. NFM had a similar expectation that Oregon law would apply, given that it was presented with the insurance request for an Oregon subcontractor (Wood Mechanix), by an Oregon insurance broker (AON), for work performed at an Oregon construction site. Accordingly, preserving the reasonable expectations of the parties weighs heavily in favor of applying Oregon law. Moreover, Oregon has a stated interest in preserving the reasonable expectations of the parties. See Timberline Equip. Co., 281 Or. at 646 (court preserved the parties' contractual expectations by rejecting insured's tort claim for coverage by estoppel; otherwise, the injured party would receive more than he would have been entitled to had there been no breach); see also Warren, 115 Or. App. at 326 ("If an insurer does not defend a claim, and thereby breaches its contract with the insured, its liability, if any, is only for breach of contract, not for tort.") (emphasis added).

Accordingly, the Court concludes that the factors set forth in the restatement demonstrate that the state of Oregon has the most significant relationship to the occurrence and the parties. Therefore, the Court GRANTS in part NFM's motion, and holds that Oregon law applies vis-à-vis Polygon's IFCA, CPA, and coverage by estoppel claims. As Oregon law does not provide for analogous relief, the Court further DISMISSES with prejudice Polygon's IFCA, CPA, and coverage by estoppel claims.

III. CONCLUSION

For the foregoing reasons, the Court GRANTS in part and DENIES in part NFM's motion for partial summary judgment, docket no. 9. The Court GRANTS in part the motion and holds that Oregon law applies to Polygon's IFCA, CPA, and coverage by estoppel claims. As Oregon law does not provide for similar claims, the Court further DISMISSES those claims with prejudice.

However, as the parties have not adequately briefed the conflict issue on Polygon's only two remaining claims, breach of contract and negligence, the Court DENIES in part NFM's motion as to these claims, without prejudice, and DECLINES, at this time, to determine which state's law applies to these claims.

IT IS SO ORDERED.

DATED this 24th day of May, 2011.

Thomas S. Zilly
United States District Judge